NOT FOR PUBLICATION – For upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

Steven Malpere,	)	
	)	
Appellant,	)	**Civ. App. No. 1999-122**
	)	
v.	)	Re: Terr. Ct. Civ. No. D58/1998
	)	
Linda Sue Malpere,	)	
	)	
Appellee.	)	
	)	

On Appeal from the Territorial Court of the Virgin Islands

Considered: November 3, 2000
Filed: September 10, 2001

BEFORE: **RAYMOND L. FINCH,** Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE,** Judge of the District Court of the Virgin Islands; and **MARIA M. CABRET,** Presiding Judge, Territorial Court of the Virgin Islands, Division of St. Croix, Sitting by Designation.

ATTORNEYS:

Jacqueline A. Drew, Esq.
St. Thomas, U.S.V.I.
Attorney for Appellant,

Vincent A. Fuller, Jr., Esq.
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

PER CURIAM.

Steven Malpere ["appellant"] appeals an interlocutory order of the Family Division of the Territorial Court issued on March

11, 1999, which ordered the appellant to pay Linda Sue Malpere ["appellee"] temporary alimony and support *pendente lite*. The court also ordered that the appellant pay a lump sum payment of $10,000.00 to the appellee to cover attorneys' fees. The appellee has also filed a separate motion pursuant to Rule 38 of the Federal Rules of Appellate Procedure for this Court to impose sanctions against the appellant for filing a frivolous appeal. Because the appellant appeals an interlocutory order of the Family Division of the Territorial Court, the threshold question is whether this Court has jurisdiction over the matter.

Jurisdiction to Review Interlocutory Order Granting Temporary Alimony

This Court has appellate jurisdiction to review judgments and orders of the Territorial Court in all civil cases. *See* V.I. CODE ANN., tit. 4, § 33. Section 33 has been judicially narrowed to apply, with few exceptions, only to final orders. *Government of the Virgin Islands v. deJongh*, 28 V.I. 153, 158-59 (D.V.I. App. Div. 1993).

This Court lacks jurisdiction to hear this appeal for two reasons: (1) an interlocutory order granting temporary alimony and support *pendente lite* is not a final order and thus not appealable under section 33; and (2) the appellant has not complied with the procedures set forth in 6(a)[formerly

6(a)(iii)] of the Virgin Islands Rules of Appellate Procedure ["VIRAP"], which govern appellate jurisdiction for appeals of civil orders that are not otherwise appealable.[1]

The appellant proceeds before this Court under the theory that an order granting alimony *pendente lite* is not an interlocutory order, despite the fact that the statute pursuant to which the appellee sought and obtained relief is titled "Interlocutory Orders." *See* 18 V.I.C. § 108. According to the appellant, an order granting temporary alimony is equivalent to a final order because the party to whom temporary alimony is awarded can enforce the order in the same manner as a judgment creditor can enforce a judgment. *See* 16 V.I.C. § 352(a) ("A judgment or order entered under this subsection against any person for the support of a person that he or she is obligated to support shall be enforceable as such as by a judgment creditor."). According to the appellant, section 352(a) "places the [Territorial Court's] ruling as one which may be appealed to the Appellate Division," apparently because the ruling represents

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[1] The Virgin Islands Rules of Appellate Procedure became effective November 1, 1998. These rules now govern procedure in appeals to the Appellate Division of the District Court of the Virgin Islands from the Territorial Court and "supersede all previous appellate rules applicable to this Court." V.I. R. APP. P. 1(c), (e). To conform with 28 U.S.C. § 1292, Rule 6 was amended effective October 31, 2000. *See* Order, D.C. Misc. No. 1998-28 (Oct. 6, 2000). V.I. R. APP. P. 6(a)(iii) is now V.I. R. APP. R. 6(a). The October 2000 amendment does not alter, however, either the substantive or the procedural requirements for petitioning this Court for permission to appeal an order in a civil case that is not otherwise appealable.

an order for support that is "enforceable as such as by a judgment creditor." We disagree.

While section 352(a) addresses the mechanisms available for enforcing an order for support, it does not establish an exception to the general rule that interlocutory orders are not generally appealable, nor can it be read to establish such an exception. Notably, the appellant makes no effort whatsoever to support with any legal authority this rather strained reading of section 352(a). Aside from his unsupported conclusion that this Court has jurisdiction pursuant to section 352(a), the appellant provides no other ground for jurisdiction. Moreover, the appellant provides no argument for this Court to broaden its general rule limiting the application of 4 V.I.C. § 33 to final orders. (*See* Appellant's Reply Br. at 2.) An order granting alimony *pendente lite* is at its very essence interlocutory in nature and not appealable except by permission.

Absent from both parties' briefs is any mention of VIRAP 6, which governs permissible interlocutory appeals. It is somewhat surprising that the appellee, who argues in her brief that the court lacks jurisdiction to review this interlocutory appeal, also overlooks the applicable procedural rules. Rule 6 provides in relevant part:

> An appeal from . . . an order in a civil action, not otherwise appealable, containing the statement by a

> Territorial Court judge that such order involves a controlling question of law about which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation [] may be sought by filing a petition for permission to appeal with the Clerk of the Court of the Appellate Division within ten days after the entry of such order in the Territorial Court . . . .

V.I. R. APP. P. 6(a)[previously Rule 6(a)(iii)]. Subsection (c) further provides that, in addition to the requirements for all interlocutory appeals,

> [p]etitions for appeals from an order pursuant to paragraph (a)(iii) [now paragraph (a)] also shall contain a statement of the facts necessary to understand the controlling question of law determined by the order of the Territorial Court; a concise statement of the issue(s) to be presented; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation.

V.I. R. APP. P. 6(c). Nowhere in the appellant's briefs, in the appendices, or in the file are there any of these required statements.[2]

In light of the foregoing, the Court will dismiss the appeal for lack of jurisdiction.

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[2] Furthermore, subsection (b) provides that "[i]n all interlocutory appeals, appellant shall move for expedited review under Rule 5[(e)]. Failure to so request may result in sanctions upon the attorney or party." V.I. R. APP. P. 6(b) (as amended). Despite the clear direction of this rule, the appellant has not moved for expedited review of this appeal, even though the case has been fully briefed since January 11, 2000.

Appellee's Motion for Sanctions for Frivolous Appeal

On November 24, 1999, the appellee filed a motion for sanctions against the appellant for filing a frivolous appeal, and the Court heard argument on this motion on November 3, 2000. Although the appellee cited Rule 38 of the Federal Rules of Appellate Procedure, VIRAP 30(a) is the applicable rule. Rule 30(a) provides in relevant part:

> If the Appellate Division determines that an appeal is frivolous, it may, after a separately filed motion or notice from the Court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

V.I. R. APP. P. 30(a). While it is true that the applicable provision of Rule 30(a) is virtually identical to FRAP 38,[3] the Court expects parties to cite the applicable rules as authority for their respective positions. Either way, the appellant was on notice that the Court could hold him liable for filing a frivolous appeal, awarding the appellee "just damages and single or double costs" for having been forced to oppose a frivolous appeal. With this in mind, we briefly discuss the appellee's motion for sanctions.

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[3] FRAP 38 provides in relevant part:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

FED. R. APP. P. 38.

There can be no question that the circumstances surrounding this appeal invite a finding that it is frivolous. *See Hilmon Co. (V.I.) Inc. v. Hyatt Int'l*, 899 F.2d 250, 253 (3d Cir. 1990) (awarding attorneys' fees and costs under Rule 38 after determining that an interlocutory appeal was frivolous when the court was without subject matter jurisdiction to review it); *see also Prosser v. Prosser*, 40 V.I. 241, 244-45, 40 F. Supp. 2d 663, 665-66 (D.V.I. App. Div. 1998), *rev'd on other grounds*, 186 F.3d 403 (3d Cir. 1999) (discussing the criteria for determining whether an appeal is frivolous). Although Rule 30 had not yet been promulgated at the time of the appeal in *Prosser*, its discussion regarding frivolity with respect to Rule 38 clearly applies here. Thus, contrary to the appellant's position, bad faith is not a prerequisite for imposing sanctions pursuant to Rule 30. *See Prosser*, 40 V.I. at 245, 40 F. Supp. 2d at 666; *see also Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993). Rather, in determining whether an appeal is frivolous, the Court focuses on the merits of the appeal. *See id.* In addition, the Court has the power to hold appellant's counsel personally liable for the appellee's attorneys' fees in opposing a frivolous appeal. *See Hilmon*, 899 F.2d at 254 ("The test is whether, following a thorough analysis of the record and careful research of the law, a reasonable attorney would conclude that the appeal is

frivolous.").

As discussed above, we are faced here with an utterly meritless appeal, bordering, we think, on a reprehensible display of obduracy on the part of appellant. This is evidenced by the fact that the appellant persisted with this appeal even though the Territorial Court judge "believ[ed] the appeal [was] being filed for dilatory purposes since there appears no apparent basis for appealing an interlocutory order . . . ." (*See* App. of Appellee at 23 (Order, May 7, 1999 (Hollar, J.) (denying motion to enlarge time to post $25,000 *supersedeas* bond)).) Under these circumstances, we ordinarily would have little trouble awarding damages in the form of fees and costs to the appellee, payable by the appellant, his counsel, or both.[4] Neither the appellant nor his counsel has presented a colorable argument why he filed and pursued this interlocutory appeal without following the applicable rules, other than to simply assert without more that the appeal is in good faith. As already stated, however, bad faith is not a prerequisite to a finding that an appeal is frivolous.

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[4] Although it is clear to this Court that any reasonable attorney would have concluded this appeal is frivolous, the appellee asked the Court to impose sanctions in the form of costs and attorneys' fees only against the appellant, rather than against his counsel or both appellant and counsel. (*See* Mot. for Sanctions, Nov. 24, 1999, at 2-3.) In the absence of notice that the Court might impose Rule 30 liability on counsel, the Court only considers an award against appellant.

Notwithstanding the above, we hesitate to hold the appellant liable under Rule 30 for several reasons. First, with respect to an award of "just damages," the appellee has presented no basis for the Court to determine what damages, if any, fairly resulted from this appeal. Second, given the purely legal errors of procedure involved, sanctions against the appellant's counsel might have been more appropriate. *See Hilmon*, 899 F.2d at 253. As noted above, however, the Court is prevented from imposing Rule 30 liability against counsel here because she did not receive notice that the Court was contemplating Rule 30 sanctions against her, as opposed to only against her client. *See Prosser v. Prosser*, 186 F.3d 403, 406-07 (3d Cir. 1999). Finally, although Rule 30 also allows the Court to award the appellee single or double costs, including attorneys' fees, the appellee and her counsel seem to be equally "in the clouds" when it comes to the procedural rules governing this interlocutory appeal. The comprehensive failure on the part of both parties and their counsel to proceed pursuant to applicable law prevents us from fairly meting out punishment against the appellant alone. Accordingly, the Court will deny the motion for sanctions.

We remind the appellee that she is already entitled to reasonable costs and attorneys' fees upon the dismissal of this appeal. *See* V.I. R. APP. P. 30(a) ("[I]f an appeal is dismissed,

reasonable costs, which may include attorney's fees, shall be taxed against the appellant . . . ."). The appellee should note subsection (b) of the rule, which sets forth the applicable procedures and time limits for having such costs taxed.

Conclusion

The Court will dismiss this appeal because it lacks jurisdiction to review the trial court's interlocutory order granting alimony *pendente lite*. The Court will deny the appellee's motion for sanctions. Finally, all counsel are strongly advised to acquaint themselves with the rules governing this Court.

DATED this 10th day of September, 2001.

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ATTORNEYS:

Jacqueline A. Drew, Esq.
St. Thomas, U.S.V.I.
Attorney for Appellant,

Vincent A. Fuller, Jr., Esq.
St. Thomas, U.S.V.I.
Attorney for Appellee.

ORDER OF THE COURT

PER CURIAM.

AND NOW, this 10th day of September, 2001, having considered the parties' submissions and arguments, and for the reasons set forth in the Court's accompanying Opinion of even

date, it is hereby

ORDERED that the appeal is **DISMISSED** for lack of jurisdiction. It is further

ORDERED that the appellee's motion for sanctions is **DENIED.** The appellee shall have fourteen (14) days from the date of this Order to file, with proof of service, an itemized bill of costs and fees incurred in opposing this appeal.

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies to:
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Honorable Maria M. Cabret
Honorable Geoffrey W. Barnard
Honorable Jeffrey L. Resnick
Honorable Brenda Hollar
Judges of the Territorial Court

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